Gateway Equipment Co., Inc. *and* Local 513, International Union of Operating Engineers, AFL–CIO. Case 14–CA–20832

June 11, l991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 7, 1991, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The judge inadvertently referred to the date of the Union's demand for recognition as May 20, 1990, at the beginning of sec. II,C, of his decision. The correct date, as he stated elsewhere in his decision, is June 20, 1990.

Michael T. Jamison, Esq., for the General Counsel.
John J. Gazzoli, Jr., Esq., of St. Louis, Missouri, for the Respondent.
Harold Gruenberg, Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case was tried in St. Louis, Missouri, on October 1 and 2, 1990.[1] The charge was filed on June 21 and the complaint was issued on August 16.

For about 18 years, the Union represented the backshop employees of Bob Sharp, Inc. (Sharp), a St. Louis-area dealership of (mostly) Ford-New Holland agricultural and industrial tractors. On April 30, Respondent purchased Sharp and hired some, but not all, of the backshop employees. On June 20, the Union requested recognition as the statutory collective-bargaining representative of the backshop employees, but Respondent refused to grant such recognition. The complaint alleges this refusal to be a violation of Section 8(a)(5) of the Act.

There are three issues to the case: (1) There is a question about how many employees make up the smallest appropriate unit at the time of the demand for recognition. General Counsel contends that there were five employees in the unit; Respondent contends there were six. General Counsel's computation excludes one David Williams who was hired principally as a truckdriver; Respondent would include Williams. (2) There is also a question whether all former Sharp employees who were hired by Respondent should be counted as presumptively represented by the Union. General Counsel contends that one Robert Lindsey should be counted as a former Sharp employee who was represented by the Union when he was hired by Respondent; Respondent contends that Lindsey had been permanently laid off by Sharp, so he should not be counted as having been a predecessor's employee when it later hired Lindsey. (3) Finally, General Counsel contends that any computation of union majoriy status should include one Mark Crow, a former Sharp employee who, General Counsel alleges, was not hired by Respondent for reasons that violated Section 8(a)(3) of the Act. Respondent admits a refusal to hire Crow, but contends that the refusal was for nonviolative reasons.

I. JURISDICTION

Respondent admits that Sharp was a Missouri corporation which, until April 30, was engaged at a St. Louis-area location in the nonretail sale and service of industrial tractors and equipment and related products and that Sharp, during the year ending April 30, in the operation of the business, purchased goods and materials valued in excess of $50,000 directly from suppliers located at points outside Missouri. Respondent further admits that at the same location, it has been in the retail and nonretail business of selling similar equipment since May 1, and it admits that it annually receives, in the operation of the business, revenues in excess of $500,000. On these admissions I find and conclude that at all times material, Respondent has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act, as Respondent further admits.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On July 5, 1972, the Union was certified by the Board as the collective-bargaining representative of the employees in the following unit:

> All mechanics, mechanics helpers and apprentice mechanics; excluding all office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

The unit description in the last contract between the Union and Sharp is:

> [A]ll employees at the Employer's [shop] located in the metropolitan area of St. Louis, Missouri, who are engaged in the repairing, maintenance, transporting and handling of construction equipment and materials of any kind or type owned, stored, or leased by the Employer, except for salesmen office help, parts department employees, superintendents, watchmen and porters.

[1] All dates are in 1990 unless otherwise indicated.

Sharp began negotiating with various prospective purchasers of the business at the first of 1990. Michael Conway, Glen Edwards, Jimmy Whitney, and Roy H. Whistler incorporated Respondent in April for the purposes of purchasing Sharp. All four of these individuals had worked for Winning Equipment Company (Winning), the principal competitor of Sharp. Sharp was located in St. Louis County; Winning was located in contiguous Jefferson County.

On April 13, Respondent gave Sharp a letter of intent to purchase the business. Ford Motor Company became involved in the process because, although Sharp could sell his building, etc., he could not sell the franchise. The franchise would go back to Ford; and Respondent was required to deal with Ford to get the franchise for itself. On Friday, April 27, the three parties reached agreement(s), and on Monday, April 30, the three parties met for final inventory and accounting before final signatures. On that date, the business was closed for that purpose. On Tuesday, May 1, Respondent opened for business.

B. *The Refusal to Hire Crow*

Crow was hired by Sharp as a mechanic in September 1985, and he worked for Sharp through April 27. For the last 2 years of his employment, Crow was the shop steward for the Union. There is no evidence that Crow was active as a shop steward for the Sharp employees, exccept that in late 1987 he opposed Sharp's cutting back to a 4-day workweek, rather than laying off one employee. As a result, Lindsey was laid off. There is no evidence that Sharp harbored any animus toward Crow for this, or any other, activity as shop steward. There is no evidence that Respondent had any knowledge of this, or any other union activity, by Crow before Respondent refused to hire him.

Along with all the other employees Crow filed an application with Conway on May 1. According to Crow, when Conway gave him an application form, Conway told him to fill it out and read an employee handbook, which Conway also gave Crow. Conway further told Crow that he would review his application and, if it appeared ''favorable,'' he would call Crow in for an interview. Conway added: ''Other than that, Bob Sharp franchise is terminated and so is your employment with Bob Sharp.'' Crow asked Conway how long it would take to find out if he had a job with Respondent, and Conway replied that he had several applications to review, and he would get back to Crow at some later point.

On May 18, by letter of that date, Conway informed Crow that ''the immediate position for which you have a applied for [sic] has been filled.'' After trying for 3 or 4 days, Crow reached Conway by telephone. According to Crow, he told Conway that he could not understand the rejection. Crow further testified that Conway ''just said my skills didn't fit what he needed.''

There is no allegation that any other employee was denied employment violation of Section 8(a)(3), and there is no evidence of animus on the part of Respondent (or Sharp).

In this posture of the case, there has been no presentation of a prima facie case of discrimination against Crow as required by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). For that reason, I would recommend dismissal of the allegation that Crow was denied employment because of his union activities, or that he was denied employment in an attempt to avoid bargaining with the Union as the collective-bargaining representative of the backshop employees.

Moreover, assuming that a prima facie case under either theory has been presented, Respondent has shown that it would not have hired Crow regardless of his union activities on behalf of the employees when employed by Sharp.

Bill Nack was the service manager for Sharp, and he was the first of the backshop personnel hired by Respondent. Conway consulted Nack about which of Sharp's employees should be hired. Nack and Conway testified that Nack told Conway that all former employees had been good employees except Murl Simler who was ''a clown,'' and Crow, who had a ''bad attitude.'' Two of the employees whom Nack specifically recommended to Conway were mechanics Charlie Previtt and Bob Lindsey. Conway hired Previtt on May 3 and Lindsey on May 9. Conway also consulted both of these employees about Crow. According to the testimony of Conway, and the testimonies of Previtt and Lindsey, both employees told Conway that Crow had a ''bad attitude'' or was otherwise difficult to work with. Conway further consulted with Dan Anich who had been president of Sharp. Anich told Conway, ccording to the testimonies of Conway and Anich, that Crow, while being a good mechanic technically, had a ''bad attitude.'' Finally, according to Conway, Bob Sharp also told Conway that Crow had a ''bad attitude.'' (Sharp did not testify.)

Conway testified that he never asked any of these five individuals what they meant by ''bad attitude'' or ''hard to get along with,'' and they did not say, but that he refused to hire Crow because of these recommendations.[2]

General Counsel points out that useages of the terms ''bad attitude'' and ''troublemaker'' have many times been held to constitute evidence of animus by the Board. This is true; however, the Board has never held that the use of the term ''troublemaker'' is presumptive evidence of discriminatory intent, or evidence of animus, in a situation devoid of other evidence of animus, as is the case here. Accordingly, I adhere to my conclusion, supra, that no evidence of animus toward Crow has been presented, and I further conclude that Respondent has proved that it would not have hired Crow regardless of Crow's union activities while Crow was employed by Sharp, and Respondent has proved that it would not have hired Crow even if the Union's majority status were not in issue.[3]

Accordingly, I shall recommend dismissal of the allegation that Crow was denied employment by Respondent in violation of Section 8(a)(3) of the Act.

C. *Majority Without Crow*

As of the Union's May 20 demand for recognition, Respondent had employed Charles Previtt, Robert Lindsey, and David Ware as mechanics. By that date Respondent had also hired as mechanics helpers Kevin Previtt (brother of Charles)

[2] Conway also refused to hire Simler, but this refusal is not alleged to be violative.

[3] A further factor detracting from the allegation that Crow was not hired in order to prevent the Union from establishing majority status is that, before the demand for recognition, Respondent offered employment to one Jeff Adams knowing that Adams was a member of the Union at the time. Adams accepted the offer, but changed his mind before reporting to work.

and Buddy Hobbs, and it had also hired as a truckdriver David Williams.

The demand for recognition specified as the requested unit:

> mechanics, mechanic helpers and mechanic apprentices in the employ of your company.

The issue that first arises is whether the smallest appropriate unit that includes those employees would necessarily include the truckdriver; if so, the Union could not have possessed majority status on the date of demand.

While the dealership was owned by Sharp, Williams was used for an undetermined period of time to pick up and deliver parts and equipment. During those times, he was not considered to be a member of the unit by Sharp and the Union. When Williams was absent, or not employed, Sharp had used contract delivery services for pickup and delivery functions.

Conway testified that during negotiations with Sharp, Sharp told him that Gateway would need a truckdriver. Conway spoke to Nack about this, and Nack recommended that Williams be hired. Conway interviewed Williams on May 3, and he hired Williams on May 7. When he was hired, Williams told Conway that he wanted eventually to become a mechanic, and Conway told Williams that ''we do try to promote from within, and if that was what he wanted, we would see if we could get him toward that direction'' and that Williams may be reclassified within 6 months (which would be 1 month after the instant hearing).

Williams did not testify. Conway testified that Williams picks up parts and picks up and delivers new and rental equipment (tractors, graders and such), and he works around the shop. Williams' shop work consists of maintaining the delivery truck that he drives (checking and changing the oil, checking the tires), cleaning equipment with the steam hose, assembling attachments (such as backhoes and loaders) and bolting them to tractors or graders, helping the mechanics in their work from time to time, and ''just about anything [else that] we want him to do.'' The mechanics, at one time or another, will do the same shop work that Williams does, including the cleaning work. Williams works from 7:30 a.m. to 4:30 p.m., the same hours as the mechanics; his wage rate is $9 per hour the mechanics are paid $14.80. On cross-examination, Conway acknowledged that Williams does no engine work.

There was no rebuttal of this testimony by Conway and Nack.

Like the mechanics, Williams reports directly to Nack. Nack was asked what percentage of his time Williams spends driving the delivery truck. Nack replied: ''I would say approximately 50 percent. There are some days that he doesn't drive at all.'' Nack further testified that Williams maintains a set of tools at the shop, although the inventory is not as extensive as that of the mechanics.

If the truckdriver were not included in the unit, he would be completely without representational rights, an assuredly undesirable result. Although the truckdriver was not included in the certification, and his representational rights appear to have been ignored by the Union and Sharp in the past, there is certainly no binding authority that holds that the truckdriver shall forever remain unrepresented, no matter who his employer may be or what work the truckdriver may do.

Although the Board will not always require the placement of a truckdriver in a more comprehensive unit,[4] it will do so if the community of interest between a driver and the production and maintenance employees is strong enough, even if the involved union objects.[5] In *Calco Plating*, 242 NLRB 1364 (1979), the employer was in the business of repairing and replating automobile bumpers. The Board, over the union's objections, included the employer's local pickup and delivery driver because the drivers spent a substantial amount at the plant working with, or in proximity to, the production employees, they did some production work, and the production employees regularly did work performed by the drivers. The drivers and production employees were subject to the same disciplinary rules, but they were under separate immediate supervision.

Like *Calco*, there is substantial contact between the two classifications, and some overlapping of job functions. Moreover, in this case the driver and the production employees are under the same immediate supervision, a factor missing in *Calco*. Although there is a substantial difference in the wage rates, all disciplinary rules and all other benefits, as stated in the employee manual that was distributed to all applicants, are identical.[6]

Because of these factors, I find and conclude that there is a community of interest between the truckdriver and the production employees that requires inclusion of the truckdriver in any unit of mechanics employed by Respondent.

With the inclusion of the truckdriver classification in the smallest appropriate unit, it is clear that the Union was not a majority representaive of Respondent's employees at the time of the June 20 request for bargaining. That is, under the law of sucessorship, the Union, at most represented Charles Previtt, Ware, and Lindsey,[7] not Williams, Hobbs, and Kevin Previtt.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

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[4] *E. H. Koester Bakery Co.*, 136 NLRB 1006 (1962).

[5] The Union's position is a relevant consideration under *Marks Oxygen Co.*, 147 NLRB 228 (1964); however, the Union has not indicated that it would not represent a unit that includes the truckdriver, and it probably would have been willing to do so if the result on Crow had been different.

[6] General Counsel refers only to relative skills as a distinction between the classifications.

[7] The issue of Lindsey's status as an ''old'' employee is rendered moot after the decision on Williams. However, see *Derby Refining Co.*, 292 NLRB 1015 (1989).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.